

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE OMAR A. DUWAIK,
Debtor.

BAP No. CO-13-047

OMAR A. DUWAIK,
Appellant,
v.

Bankr. No. 12-35505
Chapter 11

ADAMS BANK & TRUST,
Appellee.

ORDER DISMISSING APPEAL AS
MOOT

August 14, 2013

Before THURMAN, Chief Judge, MICHAEL, and KARLIN, Bankruptcy Judges.

The matter before the Court is the Appellee Adams Bank & Trust's Motion to Dismiss Appeal as Moot, filed July 31, 2013 (the "Motion"). Appellant Omar A. Duwaik filed a Response to the Motion on August 7, 2013, and Appellee filed its Reply on August 13, 2013.

Appellant filed his Notice of Appeal on June 21, 2013, appealing the bankruptcy court's Order on Motion for Relief From Stay, entered on April 12, 2013, as well as the court's June 13, 2013, Order on Pending Motions, which, *inter alia*, denied reconsideration thereof (collectively, the "Appealed Order"). The Motion advises that on July 3, 2013, the property at issue was sold. After careful review of the parties' submissions and relevant legal authorities, the Court agrees with Appellee's contention that this appeal is now moot. As such, this appeal should be dismissed.

Federal law dictates that an appeal is moot when there is no case or

controversy because some event has occurred post-appeal that makes it impossible for a court to grant any effectual relief whatever.¹ As this Court has previously indicated in *In re Egbert*,²

[a] case is moot when the issues presented are no longer “live” or the parties lack a legally cognizable interest in the outcome. A controversy is no longer “live” if the reviewing court is incapable of rendering effective relief or restoring the parties to their original position. . . . [I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant “any effectual relief whatever” to a prevailing party, the appeal must be dismissed.

It is well established that an appeal will be dismissed as moot if a debtor fails to obtain a stay pending appeal of a bankruptcy court order granting relief from the automatic stay and the moving creditor subsequently conducts a foreclosure sale, as the appellate court cannot grant any effective relief.³

Further, we stated “[t]his Court is powerless to rescind the foreclosure sale on appeal and reinstatement of the stay would be meaningless. Since this Court would be unable to grant any effective relief even if we were to reverse the bankruptcy court’s Relief Order, we conclude that the appeal is moot.”⁴ The circumstances presented here are the same as those presented in *Egbert*.

As Appellant did not obtain a stay pending this appeal, the property was sold at auction and is no longer property of the estate. If, as alluded to by Appellant in the Response at 3, grounds exist to set aside the foreclosure sale under Colorado law, he may seek to secure that remedy from the Colorado state court. There appears to be no applicable bankruptcy court remedy.

Based upon the undisputed facts, reversal of the Appealed Order could

¹ *In re Milk Palace Dairy, LLC*, 327 B.R. 462, 466-67 (10th Cir. BAP 2005).

² *In re Egbert Dev., LLC*, 219 B.R. 903 (10th Cir. BAP 1998).

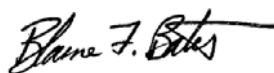
³ *Id.* at 905 (internal quotation marks and citations omitted). *See also In re Coones*, 56 F.3d 77, 1995 WL 316153, *3 (10th Cir. 1995) (quoting *In re Baker & Drake, Inc.*, 35 F.3d 1348, 1351 (9th Cir. 1994) (“The classic example of mootness in the bankruptcy context is a case in which the debtor has failed to seek a stay of foreclosure and the debtor’s property has been sold.”)).

⁴ *Egbert*, 219 B.R. at 906.

neither restore the parties to their original positions nor grant any effective relief to Appellant, rendering this appeal moot. Accordingly, it is HEREBY ORDERED THAT:

- (1) This appeal is DISMISSED AS MOOT.
- (2) All deadlines previously set herein are VACATED.

For the Panel:

A handwritten signature in black ink, appearing to read "Blaine F. Bates", with a stylized flourish at the end.

Blaine F. Bates
Clerk of Court